KOTABATO CORPORATION (M) SDN BHD & ANOR

v.

WISMA CENTRAL MANAGEMENT CORPORATION

COURT OF APPEAL, KUALA LUMPUR
RICHARD MALANJUM JCA
ARIFIN ZAKARIA JCA
JAMES FOONG J
[CIVIL APPLICATION NO: W-08-291-2001]
11 SEPTEMBER 2003

COMPANY LAW: *Winding up - Appeal against winding up order - Whether managing director of wound-up company competent to move appeal and file supporting affidavit - Proof of a person's authority to move appeal and file affidavit on behalf of wound-up company - Whether contributor competent to move appeal - Whether appellant/company must be represented by solicitor - Explanation for delay in filing appeal - Companies Act 1965, ss. 243(1), 253(2) - Rules of the High Court 1980, O. 5 r. 6(2)*

The respondent had earlier obtained a default judgment for the sum of RM9,960.58 against the appellant/company. The appellant/company, however, did not settle the judgment debt and the respondent brought a winding-up petition against it. The High Court allowed the petition and appointed the official receiver as the provisional liquidator. Dissatisfied, the appellant/company and the applicant/contributor filed the instant application before the Court of Appeal praying for: (i) leave to appeal to the Court of Appeal against the winding-up order made by the High Court; and (ii) enlargement of time to file a notice of appeal.

Held (dismissing the application):
Per James Foong J

[1] The affidavit in support of the instant application was filed by the applicant/contributor, one Mr Lim Heng Lin, who described himself as the managing director of the appellant/company. There were, however, no supporting documents to show that Mr Lim actually held that position. Hence, the court was not convinced that he was clothed with the authority to file the said affidavit or to move the instant application

for or on behalf of the appellant/company. Where an appeal against a winding-up order is being moved by a person other than the liquidator, the authority of that person to act for or on behalf of the wound-up company must be rigorously scrutinised. (p 524 b-d)

[2] The appellant/company was not being represented by a solicitor in the instant proceedings. This was a violation of O. 5 r. 6(2) of the Rules of the High Court 1980 read together with r. 4 of the Rules of the Court of Appeal 1994 and s. 372 of the Companies Act 1965 ('the Act'). (p 524 e)

[3] The applicant/contributor was not permitted by law to bring the instant application. Section 243(1) of the Act applies in respect of applications to stay winding-up proceedings and not in respect of appeals against winding-up orders. In addition, s. 253(2) of the Act allows an appeal to be moved by the affected company and not by a contributor. (pp 524 f-g & 525 a-d)

[4] There was also no explanation for the delay in filing the appeal. (p 525 e)

[Application for leave to appeal winding-up order and for enlargement of time to file notice of appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden sebelum ini telah memperoleh penghakiman ingkar terhadap perayu/syarikat berjumlah RM9,960.58. Hutang penghakiman tersebut bagaimanapun tidak dilunaskan oleh perayu/syarikat dan satu petisyen penggulungan telah dikemukakan terhadapnya oleh responden. Mahkamah Tinggi membenarkan petisyen dan berikutnya melantik pegawai penerima sebagai penyelesai sementara. Tidak berpuashati, perayu/syarikat dan pemohon/penyumbang memfail permohonan semasa di Mahkamah Rayuan memohon: (i) kebenaran untuk merayu ke Mahkamah Rayuan terhadap perintah penggulungan yang dibuat oleh Mahkamah Tinggi; dan (ii) perlanjutan masa untuk memfail notis rayuan.

Diputuskan (menolak permohonan):
Oleh James Foong H

[1] Afidavit sokongan bagi permohonan semasa telah difail oleh pemohon/penyumbang, seorang Lim Heng Lin, yang mengaku bahawa dia adalah pengarah urusan perayu/syarikat. Bagaimanapun, tiada sebarang dokumen sokongan yang menunjukkan bahawa Encik Lim sebenarnya memegang jawatan tersebut. Oleh itu, mahkamah tidak diyakinkan bahawa beliau dibekalkan dengan autoriti untuk memfail afidavit berkenaan ataupun untuk menggerakkan permohonan semasa untuk atau bagi pihak perayu/ syarikat. Di mana rayuan terhadap suatu perintah penggulungan digerakkan oleh seorang selain dari penyelesai, autoriti orang berkenaan untuk bertindak untuk atau bagi pihak syarikat yang digulung hendaklah diteliti dengan ketat dan terperinci.

[2] Dalam prosiding semasa perayu/syarikat tidak diwakili oleh peguamcara. Ini bersalahan dengan A. 5 k. 6(2) Kaedah-Kaedah Mahkamah Tinggi 1980 di baca bersama dengan k. 4 Kaedah-Kaedah Mahkamah Rayuan 1994 dan s. 372 Akta Syarikat 1965 ('Akta').

[3] Pemohon/penyumbang tidak diizinkan oleh undang-undang untuk mengemukakan permohonan semasa. Seksyen 243(1) Akta terpakai kepada permohonan-permohonan untuk menangguh prosiding penggulungan, bukan kepada rayuan-rayuan terhadap perintah-perintah penggulungan. Selain itu, s. 253(2) Akta membenarkan rayuan yang dibuat oleh syarikat yang terjejas dan bukannya oleh penyumbang.

[4] Juga tidak terdapat apa-apa penjelasan terhadap kelengahan dalam memfail rayuan.

Permohonan untuk kebenaran merayu terhadap perintah penggulungan dan perlanjutan masa untuk memfail notis rayuan ditolak.]

Case(s) referred to:
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 243(1), 253(2), 372
Rules of Court of Appeal, r. 4
Rules of the High Court 1980, O. 5 r. 6(2)

Mr Lim Heng Lin in person for the appellant/company and the applicant/contributor
For the respondent - Puan Mazlina; M/s KB Chua & Co

Reported by Gan Peng Chiang

JUDGMENT

James Foong J:

Introduction

This is an application by two parties describing themselves as the 'appellant' and 'applicant/contributor' respectively for:

(a) leave to be granted to the appellant to appeal to the Court of Appeal against the decision given by the High Court on 12 October 2001 in the case D4-28-90-2001;

(b) enlargement of time to file notice of appeal and;

(c) cost of this application to be the cost in the cause.

After having considered this application we dismissed it without the need for the respondent to reply.

We now give our reasons for our decision.

Background

On 1 November 1999, the respondent obtained a judgment in default against the appellant for a sum of RM9,960.58 with interest and cost. Due to the failure of the appellant to settle this sum a winding up petition was brought against the appellant. On 12 October 2001, Justice Wan Adnan Muhamad allowed the petition and the official receiver was appointed provisional liquidator. Unhappy over this, we believed, the appellant and the applicant/contributor wish to appeal against this High Court decision; thus the application before us.

Reasons

The first factor for consideration in our minds is the *locus standi* of the appellant and the applicant/contributor.

For the appellant, though by the authority of *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436, that rules that the appellant, besides the court appointed liquidator, also possesses a right to be heard in an appeal against the winding up order

after such order was made against it, the court must still be satisfied as to the status of the person in the appellant moving the appeal. In the *Sri Hartamas* case *(supra)*, the Supreme Court decided that the affidavit in support of an application by the company's solicitor cannot be considered to be that of the company.

In this application before us, the supporting affidavit is filed by one Lim Heng Lin. He has described himself as the managing director of the appellant and granted the authority to file such affidavit. Aside from this assertion there is no supporting document to indicate that he actually holds this position, and is clothed with authority from the wound up company to move this application. We are of the view that in a situation such as this, where the company is already wound up, and when such application is not made by the liquidator, the demand for authority to act for and on behalf of a wound up company must be stringently examined. A mere description of being a managing director without evidence to support this claim coupled with authority to specifically pursue this matter is insufficient to convince us that Lim Heng Lin is qualified and armed with authority from the appellant to file such affidavit for and on behalf of the appellant to support this application.

Above all, the appellant being a company is not represented in these proceedings by solicitors. This is in contravention of O. 5 r. 6(2) of the Rules of High Court read with r. 4 of the Rules of Court of Appeal and s. 372 of the Companies Act where it declares:

> Except as expressly provided by or under any written law, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.

Moving now to the status of the applicant/contributor, we have doubts as to whether he is permitted by law to bring an application of this nature. As a contributor, s. 243(1) of the Companies Act provides:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

But this is in respect of a stay of proceedings. It does not speak of an appeal against the decision in winding up a company. In an appeal against a winding up order made, we believe that s. 253(2) of the Companies Act should be more appropriate. Here it caters for:

> Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

If s. 253(2) of the Companies Act is to be utilized then it is for the company to institute such proceedings, not for a contributor. When such task is within the province of the company then the demand for authority on a person in the company to bring such matter before the court, as well as the need of a solicitor to begin and carry out such proceedings as expressed above, are necessary. In this case, as announced earlier, there is insufficient evidence before us to hold Lim Heng Lin as a person sufficiently armed with authority by the appellant to move this application, and he is not a solicitor by profession to begin and carry on with this proceedings as required by law.

Further, we would like to add that since the applicants' intention is to appeal against the decision of the High Court in granting the winding up order against the appellant, then the application before us must be for enlargement of time to file such appeal. Unfortunately, we are not enlightened on this by Lim Heng Lin's affidavit. When it is for leave to file an appeal out of time, then there should be some explanation offered as to the reason for the delay in filing the appeal within the specific time provided under the Rules of the Court of Appeal. None of these appeared.

Conclusion

It is on these grounds that we dismissed this application.